LAND TRANSFER. — A REPLY TO CRITICISMS OF THE TORRENS SYSTEM.

I HAVE been asked to "close for the plaintiff" in the series of articles in this REVIEW relating to land transfer, being first, the indictment, so to speak, of our present system, in "Record Title to Land," by H. W. Chaplin, in the number for January, 1893; second, "Registration of Title to Land," by Joseph H. Beale, in the February number; and third, "Land Transfer," by F. V. Balch, in the March number.

I have undertaken the task with diffidence, being conscious that, owing to the pressure of professional work, I have not been able to give to the subject as much study and thought as it deserves.

My knowledge of our system, and of its difficulties and defects, comes from actual experience; such knowledge as I have of the Torrens System comes only from reading and reflection. The latter certainly has the appearance of being far superior to our method in securing ease and certainty in land transfer. I believe that it can be adapted to our circumstances; but I should have more confidence in that belief if I had seen the Torrens System in actual operation in some of the places where it prevails.

The subject presents itself in a general way to me as follows: Lawyers and conveyancers here are daily examining and passing titles; and their clients, relying on their assurance that the titles are satisfactory, are investing money in purchasing lands and erecting buildings, and in making loans on such, to the amount in the aggregate of millions of dollars every year. In an experience of a little more than twenty years in the city of Boston and its vicinity, I cannot now recall an instance where one who has paid his money on the faith of a careful examination of the title has lost it, except in the rare cases of forgery. Why not, then, let well enough alone, it may be said. Is it "well enough"? That is just the question. What is the system under which we are making examinations and obtaining these results? The State, on the theory that it is for the public interest that transfers of land shall be open and notorious, has established the method of recording deeds

and instruments affecting title to real estate, and provided a place for recording them. Of course the idea of providing a public registry is to enable any one to ascertain the title to estates in land by examining the records of deeds. Yet that is not possible, for the State makes no suitable provision for preserving in the same place, so that they can be easily ascertained, a record of facts upon which title depends; such as actual possession by the grantors, the delivery of deeds, the genuineness of signatures, the due authority of persons who take acknowledgments, — purporting to be officers and magistrates, — heirship, capacity to contract, marriage, and divorce. It permits title to depend upon records and proceedings outside of the registry of deeds, such as of the ordinary civil courts and of courts of probate and insolvency; the records and proceedings of various public officers, such as of boards of aldermen and selectmen, street commissioners, a board of survey, and boards of health, such officers having power to take land or create liens for public improvements, such as streets, sewers, sidewalks, edgestones, and drainage of lands; and the records and proceedings of quasi-public corporations, such as railroad and water companies, to which it delegates the power of eminent domain. Then, too, the exceptions to the statutes of limitation may render necessary in some cases a possession of more than sixty years to cut off possible adverse rights, though the period in ordinary cases is twenty years. I do not give these as a complete summary of all the data that it may be necessary to look for and investigate in examining a title, but as some of the most prominent. Nor do all these circumstances occur in every title that is examined; but the possibility that there may be in these outside records and proceedings something affecting a title, throws a doubt upon every title, and makes it necessary to do much work which afterward is found to be needless.

And last, but not least, the indexes to the record of deeds themselves are incomplete and insufficient, and much work has to be done in the registry itself to ascertain the instruments which affect a particular title. It is therefore a familiar experience with lawyers and conveyancers that a large part of the work done in examining a title is found to be needless, yet it cannot be known to be needless until it has been done.

And even with the most thorough examination, we are obliged to assume the existence of these facts outside of the records, and

those who invest in lands are obliged to take some risks. Hence some uncertainty of titles, which is chiefly, however, a matter of apprehension. But the more serious evils which result from our system are the delays and expense which attend transfer of land. The indirect result of loss of opportunities for employment to those engaged in building operations seems to me a worse effect of the present system upon the interests of the public than the direct loss which can be charged to such delays and expense.

The question of the transfer of land is a matter of vital public concern. It is not a question affecting solely the comparatively small minority who hold the titles to real estate; it is one which affects the interests and life of every member of the community, for the use of land is essential to life. By our very constitution we are land animals; our bodies are composed of the substances which come from it, and which can only be obtained from land by labor applied upon or to it. The natural right to life implies the right to obtain the things which support life. The highest right which a man can have is to himself, to the fruits of his own labor. To secure to a man his right to life requires that he should have land to use; to secure to him the fruits of his own labor requires that he should have a privilege of exclusive occupation of it.

Since the State exists to secure to men the enjoyment of their natural rights (see preamble to the Constitution of Massachusetts), it follows that it is the first duty of the State to make it easy for men to acquire land, and to make them secure in the possession of it. If our laws which regulate the holding and transfer of estates in land do not bring about these results, then they ought to be changed as far as may be necessary to do so. It seems to me fair to say, first, that they constitute legal obstacles to the easy acquisition of land; second, — as to security of titles under our system, — since the State leaves it as a matter of private concern to examine titles, an examination, however carefully made, binds no one. Upon every transaction, the purchaser or mortgagee can insist upon a fresh examination. A man cannot be said to be fully secure in his title when no one is bound to admit that he has such.

But, on the other hand, it is the distinguishing mark of the Torrens System that a man who has had his title registered, and obtained a certificate, has a title which cannot be questioned. It seems to me that this feature attaches to the certificate, not

because the title proceeds from the government, or is guaranteed by it, but for the same reason that a decree of court binds parties and privies. Whatever appellation may be given to the public officer who issues the certificate, he in fact exercises a judicial function. The proceedings upon the application for registration of a title are judicial. Particular notice is given to every one who may appear to have a special adverse interest, and general notice to all the world, who are thus made parties. If after a proper interval no one makes adverse claim, the certificate is issued, just as a plaintiff gets judgment when the defendant defaults.

Again, as to the assurance fund. The providing of that is not insurance of the titles by the government; the latter is a mere stakeholder. That fund being obtained by levying a small charge upon those whose titles are registered, there is, in fact, mutual insurance by them. The advantage of having one's title registered and made indefeasible is thought to be sufficient to justify a small charge to provide a fund for compensation in the very rare cases where, under the operation of the Torrens System, one who has some substantial right is cut off without fault on his part, or where some person may become the victim of fraud or forgery. To refer such a victim to an assurance fund for compensation seems to be an improvement upon our system, under which he loses the title which he thought he had acquired, and has no practical redress to recover the money that he has paid.

The object of the Torrens System is not to enable persons who have doubtful titles to get indefeasible certificates of title, but to enable those who have good titles to estates to have their rights declared and established as against all the world. I believe that the lawyers and conveyancers in Boston and vicinity, who pursue the specialty of real estate law, would testify to the same experience as myself, that the examinations of title made in this community, despite the difficulties under which we labor, are in the vast majority of cases practically correct, and that most of the titles examined, to a very large percentage of all, are practically good. That being the case, what harm can be done to any one by giving to the results of these examinations, after proper proceedings and notice, the binding force of a judicial decree?

Then, again, registration of title is purely voluntary. If the new system should be established and exist by the side of the present, at first, certainly, the fact that a man did not get his title regis-

tered would not justify an inference that his title was doubtful. Only, it seems to me, when registration of title had been found so beneficial and become so popular that the vast majority of titles were registered, would any inference be drawn that a title not registered was doubtful.

Mr. Balch, in his article,[1] suggests some drawbacks of the Torrens System, and many points in it which seem to him weak or questionable. Among the drawbacks, he mentions "a great establishment permanently saddled on the public treasury, and a rigid system of officialism and red tape in absolute control of private transactions in land;" and, again, he suggests (though I do not now quote his exact language) that the people might be educated by it in the doctrine that the State is the great perpetual fountain of title. Any system that diminished the sense of personal independence, the tendency to personal initiative, that led the people to look upon public officers or the government as the source from which their wants are to be supplied, I should consider inadvisable. Whether or not the use of the Torrens System of registration of title has that effect upon the community in which it exists could best be learned by studying the character of the people of the Australian colonies, where that system has longest prevailed. Without such study I should not undertake to argue upon that point, either one way or the other.

Mr. Balch also suggests as drawbacks, great expense, and a quickness of transfer inferior in some cases to what can be done under our present system. As to expense, under our system this has two aspects: First, expense to the public — that is, to the taxpayers — of maintaining the officers and clerks, and providing offices and stationery and other office facilities in order to transact the business; and second, the expense to the individuals of the public for having their special matters of business transacted. I have made estimates of such expenses for the County of Suffolk. I cannot give exact figures, because the expenses for the Registry of Deeds and the Probate Court are put in together; but from the figures given I make an estimate of the expense for the Registry of Deeds for the County of Suffolk for the year ending April 30, 1891, for rent of building, lighting, care of building, supplies, indexing, stationery, etc., amounting to a total of about $35,000. The number of instruments recorded for the year ending September 30,

[1] 6 Harvard Law Review, 410.

1891, is 24,322, which I should estimate to represent eight or ten thousand transactions. The fees for recording instruments during that period amounted to $19,090.11. As to the cost to the public for examination, I can only make an estimate; but taking into consideration the number of transactions where people either examine the title themselves, or do not have a complete examination made, it seems to me that fifteen dollars per title is a fair estimate. This would give a total expense to individuals of the public of between $120,000 and $150,000 for examinations, and say $19,000 for fees for recording.

In an essay on "Transfer of Land by Registration," by Sir Robert Torrens, I find that in Australia fourteen officers and clerks suffice for a business of seventeen thousand transactions annually, costing in salaries and office expenses something under £7,000 per annum, or say $35,000, — a little more than $2.00 per transaction. This is to be contrasted with eight or ten thousand transactions in Suffolk County, costing say $35,000, or $3.50 per transaction.

I find, also, in the same essay, that in New Zealand the cost of each of 17,422 registration sales and mortgages effected in the year ending June 30, 1879, covering property to the value of £7,585,291, or say $36,750,000, was only 22*s.* 9*d.* per transaction, or $5.50, or an aggregate of $95,821; the corresponding figures for eight or ten thousand transactions in Suffolk County being estimated by me as between $120,000 and $150,000, or say $135,000 for examinations, and $19,000 for fees, or a total of $154,000.

If the system were started with us, the first expense of getting a title registered would be much larger than transfers of title after registration, and I think would somewhat exceed the expense to the public under our system for examination of title and fees for recording. The gain, of course, would come in lessened expense afterward, and greater facility of transfer.

As to quickness of transfer, the experience of the Australian colonies under the Torrens System appears to show that in the great majority of cases, which is the fair test, transfers are made with very little delay. Many of the weak or questionable points, which Mr. Balch suggests, seem to me to involve questions of administration which one familiar with our real estate law and with real estate transactions would find ways of working out, which would take too much space to answer here in detail, and which could be

answered, if it were essential to answer them now, by one familiar from actual experience with the workings of the Torrens System. Though his article is on the whole unfavorable to the Torrens System, the difficulties that he suggests, coming from one of his wide experience in the practice of real estate law, will prove of great value to any commission that may be appointed to consider the question of introducing the Torrens System here.

I wish, however, to refer expressly to the questions that he makes as to trusts and equitable rights. That feature of the Torrens System by which the certificate deals only with the legal title, disregards equitable estates, and leaves beneficiaries to protect themselves by a notice in the nature of a *caveat*, has never commended itself to me; possibly it might be found upon actual acquaintance with the Australian system that this method of dealing with trusts and equitable estates affords proper security. As to these and all other points in relation to the system, there is no reason why we should slavishly follow it in every particular, or imitate it with Chinese accuracy; but careful study of it by those familiar with our methods would show what features are best adapted to our system and methods of dealing with real estate.

There are many ways in which improvements can be made upon our system, by requiring that acts and proceedings outside of the registry of deeds, — such as, for instance, all which lead to municipal liens for public improvements, and assignments in insolvency and bankruptcy, — shall have no effect upon the title until notice of the proposed liens and the instruments of assignment are filed in the registry of deeds. Attempts have been made heretofore by an organization of lawyers and conveyancers in Boston, of which I am a member, to obtain such reforms; but, in the absence of a decided public sentiment behind, such attempts have met with little success before the Legislature.

The great advantage of the present interest in the Torrens System is that it will create a public sentiment which will bring about the adoption of improvements in our system in the line of requiring some notice or intimation of such proceedings outside of the registry to be filed there before they can have any effect upon titles to real estate.

Finally, I believe that it would be a move of great value to this Commonwealth if a commission of experts should be appointed to study in the places where they are in actual operation, not only

the Torrens System, but the method of registration of possessory certificates, and the method said to be employed in Edinburgh of giving certificates of all the instruments to be found in the records affecting the title to any particular real estate. If, as some experienced real estate brokers believe, and as appears to have been the result in some of the Australian colonies, increased facility in dealing with estates in land will add to their selling value, the increased amount derived in taxes by the State will certainly be one form of gain; but the greatest gain will be in facilitating transactions in land, and making it easier to obtain it for use. Whatever will tend to secure that cannot fail to be of advantage to the public.

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